

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHONDEL LAMAR LARKIN,
Petitioner,
v.
JAMES YATES, Warden,
Respondent.

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NO. CV 08-7117-DSF(CT)

ORDER ACCEPTING MAGISTRATE
JUDGE'S REPORT AND
RECOMMENDATION

Pursuant to 28 U.S.C. § 636, the Court has reviewed the entire file de novo, including the magistrate judge's report and recommendation and petitioner's first-amended petition, which was filed after and, thus, is alternatively construed as objections to the report and recommendation.

The Court agrees with the recommendation of the magistrate judge that the petition should be dismissed without prejudice because petitioner has not exhausted his state remedies. See 28 U.S.C. § 2254(b); Rose v. Lundy, 455 U.S. 509, 510, 522 (1982) (holding that "mixed" petitions that include both exhausted and unexhausted grounds must be dismissed). On December 1, 2008, petitioner was given leave to file a first-amended petition asserting only unexhausted grounds, and he nonetheless persisted with this mixed petition. The document filed in response to the report and recommendation contains the same five grounds

1 alleged in the original petition, including the two unexhausted grounds.

2 Accordingly, IT IS ORDERED THAT:

- 3 1. The report and recommendation is accepted.
- 4 2. Judgment shall be entered consistent with this order.
- 5 3. The clerk shall serve this order and the judgment on all
- 6 counsel or parties of record.

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8 DATED: 2/23/09

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DALE S. FISCHER
UNITED STATES DISTRICT JUDGE

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